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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

JUN 29 1992

Federal Communications Commission
Office of the Secretary

In the matter of)

)
Amendment of Parts 1, 2 and 21)
of the Commission's Rules)
Governing Use of Frequencies)
in the 2.1 and 2.5 GHz Bands)

PR Docket No. 92-080

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FILE

COMMENTS OF AMERICAN TELECOMMUNICATIONS DEVELOPMENT, INC.

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Federal Communications Commission
Office of the Secretary

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SUMMARY

ATD applauds the sentiments underlying the NPRM, as well as the proposals in the NPRM: 1) to shift MDS regulations to the Mass Media Bureau; 2) to create a consolidated ITFS/MDS data base; 3) to preclude state entry, exit and rate regulation of MDS; 4) to punish those who submit false preference requests; and 5) to reduce the existing backlog by conducting lotteries and moving forward on a first-in-first-out basis.

ATD believes the public interest is best served by the rapid processing of the backlog of pending MDS applications once the consolidated data base is established, and by the maximization of equity capital available for construction and operation of licensed systems. ATD therefore strenuously opposes the proposal to prohibit settlement agreements among already-pending MDS applicants, because the retroactive imposition of such a prohibition upon already-pending applications will slow down processing of those applications and reduce the pool of available equity capital without advancing one iota the Commission's stated goal of deterring speculative applications.

Contrary to the presumption implicit in the retroactive prohibition proposal, no pending MDS application is going to be voluntarily withdrawn if settlements are prohibited, even if the Commission offers to return the \$155 filing fee. That filing fee is a small part of the overall cost of getting an MDS application prepared and filed, and MDS applicants generally join settlements to hedge against pre-licensing (i.e., inherent lottery) risks, not

post-licensing (i.e., general business) risks. Retroactively prohibiting settlements for already-filed applications merely increases the number of applicants per lottery, precludes the possibility of full-market settlements to eliminate some lotteries, and reduces the ultimate number of partners in the eventual licensee who are available to make capital contributions.

The Commission should also expressly allow post-filing, pre-acceptance settlements of pending applications.

ATD opposes the proposal to eliminate the present carrier/interference ratio standard and to replace it with either a strict mileage separation standard or a mileage separation height/power table. The disruption this proposal will cause to wireless cable by eliminating the potential for additional channel capacity far outweighs any limited administrative convenience it creates for FCC staff in processing. Once the Commission completes the consolidated ITFS/MDS data base, the Commission will be able to formulate a simple and workable computer program enabling its processing staff to apply the current C/I ratio standard accurately and expeditiously.

ATD believes that if the Commission goes forward with its proposed revamping of MDS rules with the modifications suggested in these Comments, the Commission will have advanced in a material way the viability and competitiveness of wireless cable as a vehicle for delivery of video programming to the home.

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COMMENTS OF AMERICAN TELECOMMUNICATIONS DEVELOPMENT, INC.

American Telecommunications Development, Inc. ("ATD"), hereby submits its comments in response to the Notice of Proposed Rulemaking, FCC 92-173, released May 8, 1992 ("NPRM"), in the captioned proceeding. ATD is a full service communications consulting company with numerous clients who have entered the wireless cable industry and are currently preparing to build facilities that will help make the industry an effective competitor to traditional wired cable systems. ATD is involved in increasing the available equity capital for the wireless cable industry which is so desperately needed to expand existing services and establish new facilities. Thus, on behalf of itself and its clients, ATD has a substantial interest in the provisions of the NPRM.

ATD applauds the sentiments which led to the issuance of the NPRM. Some of the alternative proposals presented therein make excellent sense and should be implemented forthwith. However, some of the proposals set forth in the NPRM have ramifications which cannot be fully appreciated by the Commission without the input of the industry. As discussed below, some of the proposals in the NPRM, if implemented, would undercut the stated goals of the NPRM

and would sound the death knell for wireless cable as a competitive and viable industry.

Specifically, the proposal to do away with the existing interference standards and to replace them with a strict mileage separation standard would needlessly damage gut the wireless cable industry and eliminate it as a viable method of delivering video entertainment to the home. Moreover, any attempt by the Commission to retroactively prohibit settlement agreements between or among competing MMDS applicants respecting applications filed prior to the issuance of the NPRM would delay the processing of the already-pending MMDS applications and frustrate Commission attempts to eliminate the existing backlog. The proposal to centralize regulation and processing of MMDS and ITFS applications in the Mass Media Bureau, on the other hand, has enormous merit and should be effective in both reducing the existing backlog as well as preventing future backlogs from developing. In these Comments, ATD will address each of these issues as well as others raised by the NPRM.

I. The FCC Should Not Retroactively Prohibit Settlements Among Mutually Exclusive MMDS Applicants.

In the NPRM, at ¶17, the Commission proposes to prohibit settlement agreements among MMDS applicants and to apply this prohibition not only to MMDS applications filed after the effective date of the Commission's Rules, but also to all pending applications already on file. The purported justification for this prohibition on settlements is "to deter the filing of speculative

applications by restricting lottery entry to entities with a sincere interest in using MMDS frequencies for their intended purposes.[Footnote omitted.]" However, the stated goal can be met by prospectively prohibiting settlement agreements with regard to as-yet-unfiled applications. Retroactive application of the new rule to pending applications would not deter speculative filings since, by definition, an already pending application already has been filed.

An applicant that has already expended funds to design an MMDS system and file an application therefor is not going to withdraw that application voluntarily, pre-lottery, merely because settlements groups are not available. ATD does not agree with the premise underlying the Commission's proposal to prohibit settlement agreements -- that premise being that any applicant willing to enter into a settlement agreement must be an insincere applicant and a speculator -- but even assuming that the Commission's premise is correct, even an "insincere speculator", in reaction to a settlement prohibition, will maintain his or her application on file. And even if such a "speculator" were unwilling to construct and operate, such an applicant would have absolutely no incentive to voluntarily withdraw a pending application which on its face is eligible for participation in a lottery. Rather, such a hypothetical "speculator" would take his or her chances in the lottery and if successful would obtain a conditional license and then seek nonrecourse debt financing for the system. Only in the event that such financing ultimately was unavailable would such a

hypothetical "speculator" fail to construct in a timely manner, and even then he or she would merely let the conditional license expire.

Conversely, if pending applicants are allowed to settle, the lotteries for these applications will be streamlined with fewer participants in each lottery, and any lottery-winning settlement group will be able to draw on equity capital from all of the partners, not just one. This will heighten the likelihood that the station will obtain financing (either debt, equity, or a combination thereof) and that the station will actually get built and offer service to the public. In summary, the proposal to retroactively apply a settlement prohibition to already-filed MDS applications will not advance the stated goal of deterring future speculative applications. From a processing standpoint, it will delay, not expedite, the selection of a licensee.

Moreover, ATD believes that the Commission is mistaken in assuming that most MDS applicants are insincere speculators.¹ Many, if not most, settlement groups obtain one or more lottery preferences (at least a diversity preference if nothing else). And under existing rules, any lottery participant obtaining any sort of preference whatsoever must construct and operate for at least

¹ Significantly, the Commission prohibited partial settlements among mutually-exclusive nonwireline-block RSA cellular applicants in 1988. See Third Report and Order, 4 FCC Rcd. 2440 (1988). Faced with an "all-or-nothing" scenario, the public responded by filing more cellular applications per market in the RSAs than had been filed in MSAs 121-305. This experience alone suggests that prohibiting settlement groups is ineffective in reducing the number of applications filed.

one year before selling the system. Thus, even under existing rules, MDS applicants have for the most part been operating under the belief that they must construct and operate each MDS system for which they (or a settlement entity that they might join) might be licensed.

While some pending applicants may prefer joining a settlement group because it allows them to share the economic risk and reward of the new station with other entrepreneurs and because it creates a larger pool of beneficial owners to make capital contributions to the station until it is cash flow positive, most applicants prefer settlement only to ameliorate the risk to their application costs which is inherent in a lottery system. Most applicants would prefer to own 100% and to face the post-licensing risks alone. And even for those few who prefer less-than-100% ownership, that does not mean those applicants will abandon a stand-alone lottery win.² Most applicants are willing and able to construct and operate independently if he or she is lucky enough to win a lottery.³

² It is not accurate to believe that any pending applicant would withdraw his or her pending application in return for a refund of the FCC filing fees. Such fees, at \$155 per application, are a minor portion of the cost of getting an MDS application filed. Such applications include site assurance, engineering and legal costs, which together can run many times more than the \$155 filing fee. By withdrawing an application, an applicant would forego all possibility of recouping these expenditures.

³ The NPRM, at footnote 32, says that "more than 350 MDS construction permits or conditional licenses have been cancelled or forfeited for failure to construct." The NPRM claims this is evidence of speculative intent on the part of past licensees. However, ATD believes that the vast bulk of these non-constructed systems were authorized to participants in the 1983 filing window,
(continued...)

II. Settlement and Processing of Pending Applications Can Be Streamlined if the Commission Will Adhere to the Pre-Existing Settlement Policies.

When the Commission long ago decided to allow post-filing settlement of mutually-exclusive MDS applications, the Commission found that settlements were in the public interest and said it would encourage settlements. See Second Report and Order, 50 Fed.Reg. 5983, 57 R.R.2d 943, 955 (1985), where the Commission said:

Settlements are in the public interest, because they reduce or eliminate administrative burdens, delay and expenses. In addition, they allow many different parties to contribute to and participate in MMDS service.

However, subsequently the Commission staff issued a Public Notice, "Domestic Facilities Division Advisory for Multichannel Distribution Service Applicants", Mimeo No. 13244, released May 24, 1991, which Public Notice absolutely prohibited settlement of mutually exclusive MMDS applications post-filing but before issuance of a public notice indicating the applications were accepted for filing.

The Public Notice cited no Commission regulation or case law to support this prohibition, and ATD knows of none. Indeed, in the NPRM at ¶21 and n.38, the Commission acknowledges that today's

³(...continued)
which preceded the advent of the so-called "application mills". Additionally, ATD believes that many if not most of these systems were not constructed because it was not feasible to construct on only one channel group in a given market and the FCC failed to process the other channel groups in that market, leaving the licensed entity high and dry, without sufficient channel capacity to compete.

rules expressly allow post-filing, pre-acceptance settlement activity, and states that the proposal in the NPRM to prohibit settlements for all pending applications not yet placed on public notice would be "a departure from existing practices"

If, as suggested by ATD above, the Commission limits its settlement prohibition to future applications, the Commission should also expedite processing of the pending MDS applications by expressly overruling the Public Notice which has been implicitly overruled in the NPRM. The Public Notice has hindered Commission processing by effectively requiring all settlements to be hurried affairs occurring in a 16-day period between acceptance for filing (which occurs thirty days before lottery) and the two-week pre-lottery cut-off on filing settlement amendments.

The Public Notice has created a quagmire for the industry and the Commission. Settlements negotiated in such tight timeframe are less than optimal. And Commission staff have only two weeks within which to process settlement filings and recalculate preferences and lottery odds, resulting in multiple processing errors by Commission staff since the issuance of the Public Notice.⁴

⁴ The Public Notice cites the fact that only "acceptable" applications are entitled to lottery participation in support of its prohibition. The better processing course is to assume that all settlement members' applications were acceptable, and to allow lottery-losing applicants to file petitions to deny post-lottery in the few (if any) cases where a claim will be made that a lottery victor had too many chances. This procedure has worked well in other lottery contexts, such as MSA cellular, and was expressly adopted for MMDS, the Public Notice notwithstanding. See Second Report and Order, supra, 57 R.R.2d at 952.

Accordingly, ATD requests that the Commission expressly state again that post-filing, pre-acceptance settlements are permissible for already-pending MDS applications.

III. Maintaining Licensee Flexibility in System Design Is of Paramount Importance to the Wireless Cable Industry.

The NPRM, at ¶12, proposes new rules regarding the interference protection criteria currently contained in Commission rules at 47 C.F.R. §21.902.⁵ As the NPRM notes, current interference protection policies require MDS applicants to submit detailed analyses of the potential for harmful interference to co- and adjacent-channel MDS and ITFS stations. By requiring such analyses, this policy permits applicants the flexibility to establish wireless cable service in a given area after demonstrating noninterference to existing co- and adjacent-channel stations. As the NPRM correctly notes, the advantage of this system is that it affords licensees a high degree of flexibility in designing their system.

However, the NPRM proposes to eliminate the current noninterference criteria and replace it with a strict mileage separation standard requiring that proposed facilities be located at least 80 kilometers from all existing and previously applied for co-channel stations, and at least 50 kilometers from all such adjacent-channel stations. Applicants would no longer be allowed to engineer their systems to provide 45 db desired-to-undesired

⁵ Appendix B to the NPRM reflected the proposed rule changes to Part 21.902 and other related sections of Part 21.

system (C/I) ratio of co-channel interference protection. The purported advantage of the proposed alternative to interference analyses is that the use of the standard separation requirement would permit expedited processing of pending applications, as it would eliminate the need to verify and analyze the applicant's interference showing.

ATD urges the Commission to reject the adoption of the specific separation standards delineated in the NPRM. The adoption of rigid separation requirements would inhibit the development of competitive wireless cable systems in the name of expedited processing of applications. However, if the wireless cable industry is saddled with strict separation requirements, the expedited processing of applications will be for naught, because the industry will surely go into decline. Treating pending and future applications under different standards than that which was applied to existing licensees will mean that many existing operators cannot add channel capacity. Since most licensees depend on the ability to add more channel capacity to remain competitive, the Commission's proposal would hinder development of the industry.

Realistically, there is no need to change the present criteria in order to increase processing speed. The current interference analysis standard can be rendered more workable from the application processing standpoint by modifying the Commission's approach to processing. Initially, the use of fixed separation standards will not necessarily result in expedited processing of MDS applications. There will still be considerable disagreement

over whether stations to be protected are entitled to such protection.

Rather, a more workable solution would be the same scenario the Commission currently follows in the processing of noncommercial FM applications. Under Section 73.509 of the Rules, an applicant for a noncommercial FM station can drop in a station where it can demonstrate compliance with the Commission's interference standards. As a processing matter, when such applications are received in the Mass Media Bureau, the staff enters the technical information into its data base and runs it through its computer program to determine whether or not the interference analysis complies with Commission rules. This same system can work effectively with MDS applications.⁶

The Commission is proposing to overhaul and update its entire MDS and ITFS data bases and to consolidate them into one data base. See NPRM at ¶22. With this accurate, up-to-date data base, the Commission can then prepare a computer program, similar to the one utilized in the noncommercial FM areas, in order to determine whether or not any given proposal meets the Commission's existing interference standards. Technical proposals can be verified by the program.

⁶ Even in the commercial FM band the Commission has recognized that the spectrum will be utilized more effectively and that service will best be provided to the public if it allows applicants to demonstrate non-interference through engineering analysis rather than rigid spacing criteria. See, Section 73.215 of the Rules.

This is a workable solution which can effectively reduce the backlog of applications, yet preserve the flexibility wireless cable operators require in order to be able to establish viable systems.

As an adjunct to implementation of its proposed fixed separation standard or as an alternative thereto, the Commission proposes the use of a table to process short spaced application proposals similar to that used in the Specialized Mobile Radio Services. The short-spacing rerating table included in Appendix B of the NPRM for use by MDS applicants is unnecessary if the Commission maintains its current interference analysis standards. Such a short-spacing rerating table, although less constricting than a stand-alone separation criteria, by its very nature still eliminates the operational flexibility that is essential to wireless cable operators.

As the NPRM points out in footnote 20, even the proposed 80 kilometer/48 kilometer fixed separation criteria are based on assumptions that are not accurate in many situations. In any short-spacing table an assumed height-above-average-terrain ("HAAT") will have to be established. The 180 meters HAAT proposed in the NPRM is based an estimation of the average height of a typical MDS transmitting antenna. In reality however, location of MDS transmitting antennas vary greatly and assuming 180 meter HAAT will not be accurate for most real-world cases. Far greater accuracy and predictability in co-channel interference protection will be achieved by utilizing actual operating characteristics of

MDS facilities, rather than extrapolating formulas from one or two real-world cases.

IV. Application Processing for MDS Should Be Combined With Application Processing of ITFS in a Single Branch of the Mass Media Bureau.

In the NPRM, the Commission proposes various alternatives for the relocation of MDS processing, including the Private Radio Bureau's Licensing Division in Gettysburg, Pennsylvania, the Mass Media Bureau and the Common Carrier Bureau, as well as a division of processing between the Private Radio Bureau on the one hand and either Common Carrier or Mass Media on the other. ATD strongly supports the proposal to relocate MDS processing and regulation to the Mass Media Bureau.

The MDS and ITFS services are co-dependent. Almost all MDS operators need to have at least part time use of ITFS channels in order to have sufficient channel capacity to deliver a competitive video entertainment package. Moreover, MDS operators are an important and often essential source of capital for the construction of ITFS systems. Both services share the same 2596 to 2644 MHz band utilizing the same type of equipment. The propagation characteristics are identical. Since the Mass Media Bureau regulates the ITFS, it is best that the Mass Media Bureau also regulate the MDS.

As noted previously, ATD believes that much of the past failure to construct MDS systems has been due in large part to the inability of MDS construction permittees and conditional licensees to achieve the grant (to themselves or others) of additional MDS

and ITFS capacity in the same market, resulting in a lack of adequate channel capacity. If the same branch of the Mass Media Bureau was to regulate both ITFS and MDS, it is much more likely that the timing of the grant of construction permits or conditional licenses for both MDS and ITFS channels in the same geographic area would occur simultaneously, or at least in close proximity from a time standpoint. Such congruence in the timing of grants if the Commission is essential to a viable wireless cable video entertainment industry. For this reason, relocation of MDS to the Mass Media Bureau is appropriate.

As part of the relocation of MDS to the Mass Media Bureau, the Commission, in promulgating final rules in this proceeding, could also revise the MDS application form and exhibits required by that form, so as to delete the type of information which is irrelevant to MDS and to ease the processor's task in gleaning the necessary processing information from the form. For example, the MDS application form need not include information requests relative to other Part 21 services that are, unlike MDS, primarily common carrier services. The changes in the MDS application format which are likely to result from this proceeding also militate in favor in relocation of processing to the Mass Media Bureau.

V. Immediate Reduction of the Backlog of Pending Applications Is Necessary and Appropriate.

ATD supports the Commission's stated goal of reducing the tremendous backlog of pending MDS applications. ATD supports the proposal to select among pending single-channel applicants via

lottery rather than comparative hearing, as well as to complete creation of the comprehensive and consolidated data base prior to further processing.

ATD supports the proposal to treat falsification of an entitlement to a preference as an abuse of the Commission's processes. However, it is not sufficient for the Commission to merely treat such falsification as "a reflection on an applicant's basic qualifications for licensing." The Commission should state unequivocally that such falsification shall create a presumption, rebuttable only by clear and convincing evidence, that such a falsifier is unqualified to hold any FCC license and that all licenses and applications of such a falsifier will (not might) be designated for hearing with revocation being the only acceptable penalty in such a hearing.

VI. Conclusion.

ATD applauds the sentiments underlying the NPRM, as well as the proposals in the NPRM: 1) to shift MDS regulations to the Mass Media Bureau; 2) to create a consolidated ITFS/MDS data base; 3) to preclude state entry, exit and rate regulation of MDS; 4) to punish those who submit false preference requests; and 5) to reduce the existing backlog by conducting lotteries and moving forward on a first-in-first-out basis.

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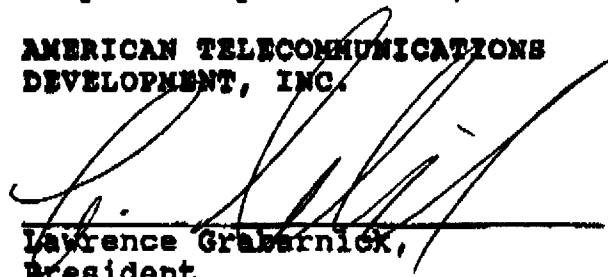
height/power table. The disruption this proposal will cause to wireless cable by eliminating the potential for additional channel capacity far outweighs any limited administrative convenience it creates for FCC staff in processing. Once the Commission completes the consolidated ITFS/MDS data base, the Commission will be able to formulate a simple and workable computer program enabling its processing staff to apply the current C/I ratio standard accurately and expeditiously.

ATD believes that if the Commission goes forward with its proposed revamping of MDS rules with the modifications suggested in these Comments, the Commission will have advanced in a material way the viability and competitiveness of wireless cable as a vehicle for delivery of video programming to the home.

Respectfully submitted,

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